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HON. SIR G. FALCONBRIDGE, C.J.K.B. FEB. 25TH, 1913.

CANADIAN LAKE TRANSPORTATION COMPANY v. BROWNE.

4 O. W. N. 880.

Principal and Agent—Moneys Due by Agent—Counterclaim—Evidence—Reference—Costs.

FALCONBRIDGE, C.J.K.B., gave plaintiffs judgment for $1,447.72, moneys had and received by defendants as agents for plaintiffs, but found in defendant's favour as to a counterclaim set up for damages on account of plaintiff's alleged wrongful acts and directed a reference to ascertain the amount of such damages.

Costs of action to plaintiffs of counterclaim to defendants.

Tried at Hamilton.

G. Lynch-Staunton, K.C., and T. Hobson, K.C., for the plaintiffs.

E. F. B. Johnston, K.C., and J. G. Gauld, K.C., for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—There is no dispute about plaintiffs' claim and they are entitled to judgment for $1,447.72 with interest from 19th December, 1911, and costs.

The dispute was as to defendants' counterclaim (1) loss to defendants by reason of plaintiffs' wrongfully unloading a shipment of wire ex Str. Regina at the wharf of another wharfinger instead of at defendants' wharf. (2) A claim for $792 for checker's wages for 1908-1909-1910. (3) Defendants allege a five-year contract and claim damages for plaintiff setting up a three-year contract and refusing to let their boats use defendants' dock for 1911 and 1912.

I am not passing on the demeanour of witnesses when I find the preponderance of evidence to be in defendants' favour as to all these items of counterclaim.

As to (1) the excuse alleged for the Regina going to the inland dock instead of to defendants' is not a valid one and is not true in fact, i.e., the alleged bad condition of defendants' dock. I do not know that defendants are entitled to the whole sum of $134.44, and this will be one matter to be referred to the Master.

As to (2) and (3) there are 2 witnesses on each side, Young and Plummer against Browne and Jordan. I do not accuse Young of trying to mould his evidence wrongly or improperly, but it is always a subject of hostile comment when a witness corrects and changes his evidence as to material facts sworn to by him at a previous examination as the result of "thinking matters over."

As to Plummer's evidence Browne kindly says: "I am sure he forgets."

It is far from the mind or intention of either Browne or Plummer to accuse each other of deliberately saying what is not true. It is a pleasant and somewhat unusual incident in a trial. The whole affair is an illustration of the oft-repeated moral that men ought to take care to have their contracts written out and signed by the parties.

Plummer says at first, "we arranged a basis for a contract—for 3 years *as far as I recollect.*" He afterwards, it is true, says: "Browne wanted a longer term and we would not agree."

Browne and Jordan are most clear and positive in their testimony as to items (2) and (3). Jordan was then an employee of plaintiffs.

On 8th May, 1908, defendants wrote a letter to Young which ought to have called plaintiffs' attention to the fact that the Browne Co. thought they had a 5-year contract. "We do not think there will be any trouble about giving your boats any part of the shed you will require so long as you and Jordan are with the line, *but something may happen in four years. . . .*"

They had already entered on the *first* year.

There will be judgment for defendants on the counterclaim with a reference to the Master as to all 3 items, and costs of counterclaim up to this judgment.

Further directions and subsequent costs reserved until after the Master shall have made his report.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 28TH, 1913.

CARVETH v. RAILWAY ASBESTOS PACKING CO. LIMITED.

4 O. W. N. 872 .

Master and Servant—Wrongful Dismissal—No Incompetence or Misconduct — Unconditional Agreement—Foreign Domicil—Election of by Contract—Jurisdiction of Courts—Con. Rule 162—Public Policy—Costs.

MIDDLETON, J., *held*, that where an employee is hired for a stated period by an unconditional contract there is no power in the employer to dismiss for mere dissatisfaction, it must be for incompetence or misconduct.

That where by an agreement the parties thereto elect domicil at a place outside the jurisdiction, the jurisdiction of the Court is not thereby ousted, and

Semble, that where under the Rules of Practice an action is cognizable by our Courts an agreement to oust the jurisdiction of such Courts, even if made in a foreign place, is contrary to public policy and void.

Western Bank v. *Perez*, [1891] 1 Q. B. 304, referred to.

An action by an employee for damages for wrongful dismissal. The hiring was under a written agreement, dated 29th March, 1912, made at Sherbrooke, Quebec, where the factory of the defendant company was situated.

The agreement was between the company on the one part, and one King and the plaintiff on the other part. The company employed King and Carveth to introduce, sell and dispose of "goods of the plaintiff, being a certain lubricant then about to be placed upon the market, manufactured under a certain patent granted to the president of the company as inventor." The agreement provided that King and Carveth should place and sell 12,000 shares of the company's capital stock at one dollar per share before the 1st of June, in consideration of which they were to be allowed jointly, two thousand shares at par—presumably paid up. It was then stated that King and Carveth were hired for one year, with the option to the company to extend for a further period of a year if satisfied with the results of their services and work. A commission was then provided upon the amount of the sales; and it was stipulated that King was to work himself in the province of Quebec only and Carveth in Ontario only. "Legitimate expenses" were to be kept to "a minimum figure;" daily reports were to be sent; and, in addition to the commission, King and Carveth

were each to be paid $2,500 per annum, in weekly instalments.

The action was tried at Toronto on the 18th and 19th February, 1913.

D. I. Grant, for the plaintiff.

W. N. Tilley, and R. H. Parmenter, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The product in question was not upon the market at all. Some brands of it were suited for use as a lubricant upon railways and street railways. If a railway or large street railway, such as the Toronto Street Railway, could be induced to adopt it the sales would be very large and the result would be immensely greater than what could be expected from sales to individual factories or by retail, where the amount required would be, comparatively speaking, insignificant.

King apparently made no success in his endeavours in the province of Quebec, and in a few weeks, the company made up its mind to dismiss him. Carveth at this time was giving entire satisfaction. It was assumed that a failure to sell the 12,000 shares by the 1st of June would justify discharge. Carveth was asked not to sell, so that the company might be in a position to get rid of King. He assented. King was got rid of, and Carveth continued; the result being that the terms of the agreement would continue to govern so far as he was concerned, save that he was removed from the obligation, originally joint, with respect to the sale of the stock.

Carveth, through acquaintances, was able to secure an introduction to the Toronto Street Railway and to the Canadian Northern. He began a series of demonstrations of the efficiency of the lubricant in question. His success was not unqualified partly because the manufacture was yet in the experimental stages and the product of unequal quality.

Carveth was sanguine and optimistic, perhaps to an unreasonable degree, and was ready to assume much from any encouragement that he received from those in charge of the affairs of these railways. I think that he honestly did his best to accomplish the introduction of the wares in question; and, while his correspondence is perhaps too rosy and optimistic I acquit him of any intentional misleading or dis-

honesty. The importance of securing the adoption of the lubricant by these railways was quite manifest to the company. Carveth was told to devote himself to the street railway and let all else go; and while in the result nothing was accomplished I am not sure that he was entirely to blame.

It is to be borne in mind that the hiring was for a year certain, to be continued for another year if the company was satisfied. The position was such when the dismissal took place in August, that the company might well with perfect honesty say that the situation was not satisfactory; but they had not by the agreement reserved to themselves the right to dismiss at any time if dissatisfied.

I do not think there was any such incompetence or misconduct as would justify dismissal. The result was not as satisfactory as either Carveth or the company hoped for; and the company made up its mind to change the mode of carrying on its business and to close the Ontario office and concentrate their endeavours on the obtaining of a foothold elsewhere. As a matter of business policy this was probably wise; but this did not entitle them to take the course they did with the plaintiff. In every such hiring, where the master does not expressly reserve the right to dismiss at any time, the employee is taken to some extent for better or for worse. There must be as I understand the cases, more than mere dissatisfaction with the result; there must be incompetence or misconduct.

It is significant that in this case there is not throughout the correspondence, voluminous and extensive as it is, any complaint. The expense accounts were regularly sent in. No doubt these included expenses for cigars and entertainment to those engaged with the two companies in question. The employees of these companies were no doubt put to some inconvenience and were no doubt asked for favours, so these expenditures were not without reason, but beyond that they were the very things contemplated by the expression "legitimate expenses," and there never was any objection to what was being done, until the defendant company decided to change its plan of operations. The evidence of the defendants' representatives was most unsatisfactory.

The question as to the plaintiff's right to sue in Ontario was raised at an early stage and a conditional appearance

was entered. The existence of assets within Ontario to an amount exceeding $200 was admitted at the trial though it had been denied on the motion to set aside the service so there is now no question so far as Rule 162 is concerned.

The right to sue in Ontario is also denied upon another ground. By the contract the parties elect domicile at Sherbrooke, where the contract was made. It is said that this not only permits but compels resort to the local Court at Sherbrooke. The Civil Code art. 85 provides that in such case "demands and suits relating thereto may be made at the elected domicile and before the Judge of such domicile." Section 94 of the Code of Civil Procedure makes it plain that even within the province this does not prevent suit elsewhere as a defendant may be summoned either before the Court of his domicile or the Court of domicile elected as well as before the Court where served or in certain cases the Court where the plaintiff resides.

This falls far short of an agreement not to sue in any foreign Court to which the plaintiff might otherwise resort. Quite apart from this the right to resort to our Courts is determined by the Rules, which have the force of statutes. This is so stated in *Western Bank* v. *Perez*, [1891] 1 Q. B. 304, and probably any agreement not to resort to our Courts even when made abroad would be regarded as against public policy and void.

The plaintiff's claim is exaggerated, and I think should be confined within the bounds indicated at the trial, namely, for the period between his dismissal and the date when he secured other employment, plus the $8 due him on expense account; in all $358. I think this should be with County Court costs and without a set-off.

MASTER IN CHAMBERS. FEBRUARY 28TH, 1913.

MEREDITH v. SLEMIN.

4 O. W. N. 885.

Costs—Security for—Action against Peace Officers—1 Geo. V. c. 22, s. 16—Defendants Sued in Public Capacity—Amendment Permitted—Order Made.

MASTER-IN-CHAMBERS ordered security for costs under 1 Geo. V. c. 22, s. 16, in an action against three police officers for false arrest and assault upon plaintiff, where it was clear from the statements of claim that defendants were being sued in their public capacity, but allowed plaintiffs time to amend the statement of claim to claim against defendants solely in their private capacity.

Parkes v. *Baker*, 17 P. R. 345, and *Lewis* v. *Dalby*, 3 O. L. R. 301 at p. 304, referred to.

Motion by defendants for an order for security for costs under 1 Geo. V. ch. 22, sec. 16.

The action was brought against four defendants of whom Slemin was said in the statement of claim to be Chief of Police at Brantford, two others were members of that force and the last was a physician practising in that city. The claim of plaintiff was for defendants having illegally and without warrant of law, &c., arrested the plaintiff and for illegally assaulting her. This was apparently confined to the first three defendants though not so said distinctly. Then it was alleged that these defendants caused plaintiff to be taken to the office of the other defendant when she was again assaulted and subjected to a physical examination.

There was also a charge of the defendants having conspired to arrest and falsely imprison and assault the plaintiff.

F. Aylesworth, for the motion.

J. M. Godfrey, for the plaintiffs.

CARTWRIGHT, K.C., MASTER:—The Act of 1 Geo. V. repeals chapters 88, 89 and 326 of R. S. O. (1897). Instead of the notice of action prescribed by sec. 14 of R. S. O. ch. 88, the present Act by sec. 13, sub-sec. (3) directs that if plaintiff has not given the defendant a sufficient opportunity of tendering amends before action the Court may award the defendant costs to be taxed as between solicitor

and client; otherwise notice of action in these cases seems to be no longer necessary.

Here it is set out in the statement of claim and admitted by defendants that on or about 5th December, 1912, notice of action as directed by ch. 88 was served on defendants personally. But this would not revive the repealed Statute.

Affidavits have been filed by all the defendants (on which they have not been cross-examined) setting up what will be a conclusive defence if proved, viz., that all that was done to plaintiff was at her own suggestion and with her consent to relieve her from imputations of misconduct and that they never acted or assumed to act in any way as police officers. It is admitted that plaintiff and her next friend are not good for costs.

In *Parkes* v. *Baker*, 17 P. R. 345, it was held by the C. P. D. that the pleadings must be looked at to determine whether a defendant who holds a public office is sued as such and so entitled to security for costs. Applying that test to the present statement of claim, it seems clear that the defendants other than Ashton are being so proceeded against at least as to everything except the alleged charges of assault and perhaps of conspiracy to cause the arrest or assault of the plaintiff. There is nothing, however, alleged against the other defendant of this character. He is not even said to hold any public office. As to him, therefore, it is plain the motion cannot succeed.

As to the other three defendants the question is different. The allegations of the statement of claim are quite unmistakable that they being police officers arrested the plaintiff or caused her to be arrested and imprisoned "illegally and without reasonable and probable cause." On the present statement of claim I am unable to see how these defendants can be denied security.

A case very similar in some respects is *Lane* v. *Clinkinbroomer*, 3 O. W. R. 613, where security was refused.

The plaintiff may have leave to amend if desired so as to make a claim, e.g., for assault and conspiracy or otherwise as thought best. This should be done in a week and if not the order must go for security as to the three police officers.

Costs will be in the cause in either case.

See *Lewis* v. *Dalby*, 3 O. L. R. 301, where at p. 304, it was said by Meredith, C.J.: "It seems to me that by your having to admit the necessity of giving notice of action, you cannot successfully contend against the giving of security. If you wish to avoid giving security why not proceed against the defendants in their private capacity and not as police constables?"

HON. SIR JOHN BOYD, C. FEBRUARY 28TH, 1913.

REICHNITZER v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

4 O. W. N. 875.

Insurance—Guarantee—Honesty of Employee—Defalcation—Evidence—Technical Defences—Reference.

BOYD, C., gave judgment for plaintiff for $2,000 and costs in an action upon a policy of insurance under which defendant company insured plaintiff from loss by reason of the defalcations of defendant Munns, the employee and agent of plaintiff.

Reference if desired to Local Master.

Action upon a policy of insurance for $5,000 in favour of plaintiff, insuring him against loss by reason of the default of his employee the defendant Munns.

Sir George C. Gibbons, K.C., for the plaintiff.

T. G. Meredith, K.C., for the defendants.

HON. SIR JOHN BOYD, C.:—The justice of the plaintiff's claim commends itself, not so the defences raised by the corporation, which savour of technicality. For value paid by the plaintiff the defendants undertook to guarantee the honest dealing of the defendant Munns in his conduct of the business of the plaintiff in Europe and at Berlin. The agent of the defendants who made the contract knew that the essence of the transaction was to protect the plaintiff and that the Dressed Casing Company was substantially a synonym for the plaintiff who had put all the capital in and merely shared profits with his employee Munns to encourage him to greater exertion and faithfulness. The guarantee company had no reason to suppose or understand that their engagement was other than this.

The evidence leads me to believe that Munns has been guilty of considerable defalcation. The exact extent cannot perhaps be measured till the accounts are taken as to his interest in the Dressed Casing Company—but apart from this precision, the circumstances proved indicate that he has dishonestly made away with the money and goods of the plaintiff to the extent of say $2,000.

The judgment may be entered for this amount with costs, subject to variation at the instance of either party by reference to the Master. If such reference is desired and the amount is reduced, costs of reference will be paid by the defendant corporation.

The Dominion Dressed Casing Company may be added as a party now or in the Master's office (if there is a reference), and is to be bound by the judgment.

MASTER IN CHAMBERS. MARCH 1ST, 1913.

UNION BANK v. TORONTO PRESSED STEEL CO.

4 O. W. N. 887.

Judgment—Motion to Re-open—No Appearance through Inadvertence—Prima Facie Defence—Terms—Payment into Courts—Costs.

MASTER-IN-CHAMBERS set aside a judgment entered in default of appearance and allowed defendant to defend on terms where appearance was not entered through inadvertence and defendants set up a good *prima facie defence.* Defendant to expedite the trial in every way, the amount of the judgment and interest to be paid into Court if desired by plaintiff and costs of motion to plaintiff in any event of cause.

Motion by the defendant company to set aside a default judgment obtained by an oversight of the solicitors for the defendant company in not entering an appearance in time.

J. H. Spence, for the motion.

H. Cassels, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The amount involved is over $3,000. There are three different defences suggested, the principal one being that the fact is and that the same was well understood by the bank through its officers that the cheques sued on were given for the accommodation of one of the co-defendant companies and that the Pressed

Steel Co. received no benefit from them. The decision on this point may largely depend upon the impression made at the trial by the witnesses on the presiding Judge. It is clear from the careful and elaborate analysis of the depositions taken on the cross-examination of the affidavits made in answer to the motion that there are serious difficulties to be overcome by the defence; yet it is the usual practice under C. R. 312 in conjunction with C. R. 353 to allow a defendant liberty to have his action tried out when it can be done without injury to the plaintiff and on such terms as will ensure to the plaintiff if successful fruits of his judgment. Here there is no danger of plaintiff failing to realise the amount of any judgment it may recover as the assets of the defendant company are in the hands of the assignee who is willing to deal therewith as may be desired.

Following *Muir* v. *Guinane*, 6 O. W. R. 64, and cases cited, I would allow the defendant company to put in a statement of defence forthwith and require them to expedite the trial in every way that the practice will allow and the plaintiff desires. The amount of the judgment and interest should be paid into Court if plaintiff wishes this to be done. The costs of the motion and of the proceedings will be to plaintiff in any event, or if parties agree I will fix them now so that defendant can pay them if they wish to do so.

Any amendment may be made to the style of the cause that is necessary owing to the assignment made by the company since the action began. See *Head* v. *Stewart*, 4 O. W. R. 590, affirmed on appeal (not reported) but defendant relieved from giving security on the ground that defendants were always entitled to a trial on proper terms and should not be unduly fettered.

In the present case the plaintiff will be amply secured by the above provisions.

HON. MR. JUSTICE MIDDLETON. MARCH 1ST, 1913.

RE CAMERON.

4 O. W. N. 876.

Parent and Child—Application by Father for Custody—Child in Home of Aunt from Birth—Father Separated from Wife—Welfare of Child—Right of Access Provided for.

MIDDLETON, J., refused a father custody of his child as against his sister, the child's aunt where the child, a girl of seven, had been brought up from birth by the latter, having been given into her care by the father and where from the father's circumstances, he being separated from his wife, he could not offer the child as comfortable a home as her aunt was furnishing her.

Order made for access to the child by the father.

Motion by the father for custody of his child on return of *habeas corpus*.

W. A. Henderson, for the father.

H. S. White, for the child's aunt.

HON. MR. JUSTICE MIDDLETON:—The child is seven years of age. The mother died in January, 1906, three weeks after the birth, and the husband married again in April, 1907, but this marriage did not turn out well and Cameron and his second wife separated in less than six months.

At the time of the death of the mother of this child Cameron placed it and another child a boy a few years older with his sister Mrs. Lang, who has had it ever since.

Cameron resumed custody of the boy some three years ago since which time the boy has been for some considerable part of the time in the Boys' Home.

Cameron has now a house which is kept for him by a Mrs. Waterman who acts as his housekeeper. Nothing is said against her in any way but she is an elderly woman employed as a domestic in charge of the house. Cameron's own affidavit indicates her position, "I believe Mrs. Waterman is well able to look after my house and is now doing so, and that the said Grace Cameron would receive good care and attention from her. If it should happen that Mrs. Waterman is not the proper person to look after the said Grace Cameron I will see that some other person is employed who will give her proper care and attention."

The case has given me much anxiety as I realise the extent of the father's right to the custody of his children and the responsibility of depriving him of the duty and privilege incident to this right, and I have also present to my mind the disadvantage of separating two children. Yet the facts of this case which I refrain from setting forth at greater length convince me that the welfare of this little girl requires that she should be left in the custody of the aunt who has stood in the place of her mother almost from the day of her birth rather than in the custody of the father who will have to be away from home during most of her waking hours earning his livelihood so that the real custody and training will devolve upon a hired housekeeper.

It may be the father's misfortune that he has not a better established home to which he can take his child but he has voluntarily left her with his sister until now any change must be prejudicial to the child who has been well cared for so far, and whose present custodians are at least as well off financially as the father.

The aunt must allow all reasonable access to the father and must undertake to do nothing to prejudice the child against the father who should have liberty to renew this motion if circumstances change.

I do not think costs should be awarded.

MASTER IN CHAMBERS. MARCH 1ST, 1913.

MURRAY v. THAMES VALLEY GARDEN LAND CO.

4 O. W. N. 886.

Pleading—Statement of Claim—Motion to Strike out—Paragraphs——Particulars—Necessity of—Costs.

MASTER-IN-CHAMBERS refused to strike out certain paragraphs of the statement of claim herein or to order further particulars than those already furnished which were quite ample for purposes of pleading.

Costs to plaintiffs in cause.

After the order made in this case reported in 24 O. W. R. 52 further particulars were delivered.

Motion by the defendants to strike out paragraphs 4, 5, 6 and 15 of the statement of claim as embarrassing as well as paragraph 8 or part thereof, and that paragraph 1 of the

particulars relating to said paragraph be struck out and proper particulars delivered in respect of this and paragraph 11 of statement of claim.

W. J. Elliott, for the motion.

N. F. Davidson, K.C., contra.

CARTWRIGHT, K.C., MASTER:—There does not seem to be anything objectionable in the paragraphs of the statement of claim now attacked for the first time which are mainly historical but set out facts which plaintiff relies on.

This would therefore seem to be an afterthought and to be put forward rather as a ground for the extension of time for pleading to 5 weeks which was refused on the previous motion and is now renewed, being supported by an affidavit that this is necessary in order to communicate with defendant Macdonald who is absent in England.

It was also objected that the particulars in some respects varied from the allegations in the statement of claim. If that is so then the plaintiff will be necessarily confined to the latest statement of his case. At this stage particulars are really amendments of the statement of claim.

The two typewritten pages of details of the misrepresentations relied on as given in the statement of claim are now supplemented by further details covering four more typewritten pages. It seems almost self-evident that defendants have all they require to enable them to plead. If at a later stage they require further particulars for the trial these can be obtained on discovery as pointed out in *Smith* v. *Boyd*, 17 P. R. 463. Here it is scarcely possible to believe that defendants cannot plead in the way that our practice allows. The full information given is almost equivalent to "seeing the plaintiff's brief." Justice will be done by directing the statements of defence to be delivered in 10 days from this date, the plaintiff to be confined to the particulars now delivered unless further or other particulars are delivered not less than 3 weeks before the trial. The defendants will be able to amend if they wish to set up anything more than they intend to rely on at present.

The costs of this motion will be to plaintiff in the cause. I note that the writ herein was served on defendants six or seven weeks ago—and the endorsement gave a

general indication of the plaintiff's claim sufficient to inform defendants of the grounds on which they were being attacked. The solicitors accepted service for the defendant Macdonald on 18th December, 1912.

MASTER IN CHAMBERS. MARCH 1ST, 1913.

MORGAN v. THAMES VALLEY GARDEN LAND CO.

4 O. W. N. 887.

Pleading—Statement of Claim—Particulars—Order for.

MASTER-IN-CHAMBERS ordered further particulars of the statement of claim herein but dismissed a motion to strike out certain paragraphs thereof.

Costs to defendants in cause.

Motion by the defendants to strike out paragraphs 2, and 3 or parts thereof or statement of claim as embarrassing and for further and better particulars of paragraphs 3, 5, 7, 8, 9, 11 and 12 and of the claim of $5,000 damages.

This case is similar in its facts to that of Murray against the same defendants.

W. J. Elliott, for the motion.

Gordon Waldron, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—There does not seem anything embarrassing in paragraphs 2 and 3 of the statement of claim. They state shortly the facts which led up to plaintiff's connection with the defendants' enterprise as set out in the subsequent paragraphs.

It was conceded on the argument that some particulars should be given. There will be an order similar to that made in the *Murray Case* (so far as applicable) on 8th February inst.

Defendants to have 10 days from delivery of particulars to plead—costs of this motion to defendants in the cause.

I refer in this case to what I have said in my judgment in the *Murray Case* on the motion for further particulars and extension of 5 weeks for pleading.

HON. MR. JUSTICE HODGINS. MARCH 1ST, 1913.

FAIRWEATHER v. CANADIAN GENERAL ELECTRIC CO.

4 O. W. N. 892.

Negligence—Master and Servant—Volenti Non Fit Injuria—Exhaustive Discussion of Doctrine of—Defective Appliances—Common Law Liability—Right of Deceased to Engage in Work—Duties of Deceased—Contributory Negligence—Apportionment of Verdict.

Action under the Fatal Accidents Act for damages for the death of plaintiff's husband, foreman in charge of a power house of defendants, by reason of the alleged negligence of defendants. Deceased while cutting ice away from the apron of a sluiceway used for carrying away water, ice, &c., slipped into the stream and was drowned.

HODGINS, J.A., *held*, that deceased whose paramount duty it was to keep the stream clear and the power house running, had a right to personally engage in the work he was engaged in at the time of his death, even though he knew he might employ others to perform it for him.

Barnes v. *Nunnery Colliery Co.*, [1912] A. C. 44 at p. 50, referred to.

That deceased did not upon the evidence voluntarily incur the risks involved in the work.

Exhaustive review of cases on doctrine "*Volenti non fit injuria.*"

That defendants were negligent in not providing adequate and safe appliances for the work in which deceased was engaged.

Wilson v. *Merry*, L. R. 1 Sc. App. 33, and *Smith* v. *Baker*, [1891] A. C. 325, followed.

That upon the evidence deceased was not guilty of contributory negligence.

Judgment for plaintiff for $2,500 and costs.

Action for damages for the death of plaintiff's husband, foreman of a power house of defendants, through the alleged negligence of defendants.

Tried at Peterboro Non-jury Sittings, 21st and 22nd January, 1913, and in Toronto, 1st February, 1913.

E. G. Porter, K.C., for the plaintiff.

G. H. Watson, K.C., and Hayes, K.C., for the defendants.

HON. MR. JUSTICE HODGINS:—The facts in this case on which liability must be determined are somewhat complex. The plaintiff's husband, who had returned to the employment of the defendant company on the 20th November, 1911, as foreman in charge of the Nassau power house —situate beside the Otonabee river—was drowned there on Sunday the 14th January, 1912, at about 10.30 a.m. He

had gone out on the ice which had formed on and over the apron of a sluiceway, for carrying off water, ice and debris, leading through the wing-dam from the fore-bay and discharging into the Otonabee river. When about four or six feet from the outer end, and while cutting away the ice with a short axe so as to clear the apron, he fell into the river, and, notwithstanding the efforts of his companion, Bert Lockington, to reach him with his ice axe, he was carried around by a swift eddy and under the ice near the dam, and drowned. His body was not recovered for three months afterwards.

The Nassau power house is owned by the defendants, and supplies power to their main works in Peterboro. There is at Nassau a large dam across the Otonabee river, the two westerly openings of which allow the water of the river to enter the fore-bay. Right across the fore-bay from these openings is an iron rack, consisting of a lattice-work of steel or iron rods close together, through which the water is admitted to the flume that carries it under the water wheels in the power house.

The riverside of the fore-bay and flume is formed by the wing-dam, which extends down the river from the main dam and at right angles to it; the rack meeting the inside of the wing-dam about half way down its length and running at right angles to it. Just above this point of junction, and sixty-three feet from the dam, is the sluiceway in question, which opens from the fore-bay and is five feet 10 inches across, 4 feet 6 inches high, and 23 feet 6 inches long through the wing-dam. This sluiceway has a movable gate on the side of the fore-bay, and extends through the wing-dam, terminating in an apron sloping down towards the river and supported on each side by two iron rods fastened to the face of the wing-dam. It was at the time of the accident 10 feet 3 inches in length, but has since been shortened to about five feet.

The river water is admitted through the two westerly openings of the dam into the fore-bay; and, in order to keep the rack clear of debris, anchor ice and other obstructions, this sluiceway is used and is kept open when anchor ice is present. Anchor ice is the chief difficulty in winter and trouble is caused as well by ice which forms on the surface of the water in the fore-bay. If the rack gets

clogged the passage of the water through it, and by the flume to the wheels, is retarded or stopped with the result that power wholly ceases to be transmitted, or passes only in reduced volume, to the Peterboro works. The importance of keeping the rack clear and allowing the free transit of water through the flume to the wheels is admitted. In fact it is absolutely necessary. There was a letter put in evidence (Exhibit 12) from the superintendent of the Peterboro works to the deceased dated six days before his death, delivered to him by Cotton on the same day which shews the importance attached to uninterrupted operation of the power plant:—

Peterboro, Jan. 8th, 1912.

Mr. Fairweather:—

This will be handed to you by Mr. Cotton. I have sent him out to see you, to give you the results of his experience in running the power house, which he did for a good many years, very satisfactorily indeed.

I am frank to say that your operation of the power house has been fairly satisfactorily, until the cold weather came, and since then it has been at times quite unsatisfactory.

I hope Mr. Cotton will be able to give you such information that will eliminate any further cause for complaint. Saturday morning, and this morning, the unsatisfactory operation probably cost us anywhere from $100 to $500.

You can quite understand that such a condition of affairs is intolerable, and must be stopped at once.

General Superintendent.

Evidence was given on behalf of the defendant company that the ice that formed on the apron of the sluiceway was formed by spray from the falls and on the part of the plaintiff that it was caused partly by spray and partly by the freezing of the water let out by the sluiceway, combined with the anchor ice. I think the latter theory is the correct result of the evidence and accounts for the principal part of the ice and that the spray added to it. The condition of the apron or the sluiceway and the formation of ice thereon was shewn by 2 models, and both Paterson, the defendants' general superintendent and Dobie, the mechanical superintendent, admit that they have seen the ice pile up on the sluice apron, Dobie describing it as a "constant condition" since the wing-dam was built.

This is an important admission if that condition is contrasted on defendant's own model (exhibit 7) with the other sluiceway and apron lower down. Johnston, night operator, at the power house, says that an accumulation of ice like that on the model will fill up in 24 hours.

The questions raised by the defence were (1) That what deceased was doing was not his work as he had a helper specially employed to clear away ice and had the right to call upon others nearby for that purpose. (2) That he knew of and voluntarily incurred the risk and that the defendants had provided ropes the use of which would have prevented the fatal result of a fall into the river. (3) That he was in a specially dangerous place at the moment of the accident which he need not have occupied. (4) That the clearing away of the ice could have been done by getting down into the sluiceway and working from there instead of on top of the ice.

The first question is as to the right or duty of the deceased to assist in cleaning away the ice at all. I do not think that a foreman in charge of such a station, responsible for its efficient operation, is travelling outside his duty if he does or assists in doing work which those under him may be employed to do, if it is work necessary and proper to be done. It appears that the apron of the sluiceway had accumulated a large amount of ice which rendered it useless unless it was cleared.

It is true that some of the evidence given for the defendant company minimised the amount of ice and tended to shew that the ice had not formed completely over the top, but my conclusion from the evidence, having regard to the rapid formation of anchor ice, and the fact deposed to by Bert Lockington, his companion, that there was no opening as shewn in the model, exhibit 5, when he and the deceased began to chop, is that there was such an amount of ice there, that either in the way adopted by the deceased or in that suggested by witnesses for the defendant company, or in some other way, it was necessary to clear it away. Hence, I think it was work that was urgent and that required speedy action. And, apart from the question of whether the deceased was justified in doing just as he did, I think it was natural and proper for him to have taken steps at that time to clear the apron. It was shewn that he had telephoned a short time before—on January 2nd, 1912,

—to the Peterboro works for help in that direction, and that Bert Lockington had then been employed. It was asserted that others of the Lockington family could be called on (under some understanding not very definite in its terms) to assist. William Lockington, the father—called for the defence—denies any understanding; and George, the other brother, is not asked to say whether it existed.

But I do not think that the right to call for others, if proven to be known to the deceased, could in itself absolutely debar him as operator in charge from doing or assisting in doing work necessary at the moment, if in his judgment he could do it without calling them in. Otherwise it would follow that he would be justified in doing nothing but requisitioning help; and I do not find in the evidence anything to warrant me to holding that his power and duty were so limited.

What the deceased did, was done entirely for the benefit of the defendant company, under the pressure of their written complaint and was undoubtedly necessary, when undertaken, for the proper operation of the works under his charge; on the successful working of which the defendant company's principal works depended.

My view in this respect is fortified by the evidence of Delisle, engaged in operating the plant on day shift at the power house from April, 1906, till November 22nd, 1911 (the deceased during part of the time being in charge at night, and replacing Delisle on November, 1911, in charge): of Johnston, night operator since 9th April, 1910; and of Cotton, in charge from 1902 to 1906. They all worked on the ice, although they had helpers. Delisle had seen the ice on the apron in the condition shewn in exhibit No. 5, more than once, and had removed it, and had got down on the top of the ice to do so, with a rope, and says the operator would remove it if he could do it himself. Johnston says the same thing, and adds that the ice was removed from the sluiceway by chopping, sometimes on wing-dam with long ice chisel and sometimes by getting down on the ice close to wing-dam and out four or five feet. He did this three times, twice with rope and once without. He says he had to keep the sluice clear, and that the man he had helping him, and he himself, had to keep it clear, and that was why they did it, though dangerous. He adds that Lock-

ington was employed because the ice got so bad that they could not look after it themselves.

Cotton had helped to cut ice in 1902/6 and was engaged in it all the week previous to the deceased's death, and says if the latter was out on the apron cutting ice, he would have thought it necessary, that he was to look after the successful operation of the power house, including ice. He also says that he (Cotton) had impressed on him the urgency and importance of his duties after he had delivered the letter. He qualifies the duty as to ice, limiting it to the hired men; a restriction he did not act upon either in 1902/6, when in charge, or in 1912.

Bert Lockington says he knows of no way except cutting as deceased did.

Patterson the defendant's general superintendent states deceased's duties as being "to see to the successful operation of the machinery at the power house," and that defendants relied on his judgment "in a way."

The cause of the letter, exhibit No. 12, was stated by Patterson (who had previously said that there was no condition of urgency) to be because, prior thereto, the operation had been unsatisfactory, and the defendants' factory had to shut down three or four times; a condition which he declares to have been intolerable, and so states in the letter.

It cannot be said that in this case, upon the evidence, the deceased's employment did not "directly or indirectly oblige him to encounter," the peril (as put by Lord Atkinson in *Barnes* v. *Nunnery Colliery Co.*, [1912] A. C. 44, at p. 50), nor that the thing he did was different in kind from anything he was required or expected to do (per Lord Loreburn, L.C., p. 47, S. C.).

Lord Justice Collins in *Whitehead* v. *Reader* (1901), 2 K. B., at p. 51, points out that "we have to get back to the orders emanating from the master to see what is the sphere of employment of the workman." See also *Rees* v. *Thomas*, [1899] 1 Q. B. 1015.

I think the act that resulted in the death of the plaintiff was not only in the line of his duty, but was really the result of what might almost be called an emergency. Cotton had arrived on the 8th January, which was a Monday. During the days which followed efforts were made to break up the heavy surface ice, which had formed in the forebay; and on the Wednesday, Thursday, and Friday, there were work-

ing Cotton, the two Lockingtons, and the deceased. The record of temperature for that time is as follows:—

Jan.	8,	1912,	Max.	21°	above,	14°	below
"	9	"	"	30°	"	10°	above
"	10	"	"	18°	"	2°	below
"	11	"	"	4°	"	10°	"
"	12	"	"	2°	"	16°	"
"	13	"	"	4°	"	29°	"
"	14	"	"	20°	"	10°	"
"	15	"	"	21°	"	10°	above

Some differences of opinion occurred among the witnesses as to the formation of anchor ice; the majority favouring the idea that a low temperature produces it, while Cotton asserted that it needed a change of temperature. If so, the above records shew (exhibit 8) that there was a rise of 19 degrees on the 14th as above the 13th, and a drop of 13 degrees from the 12th to the 13th, as well as a snow fall on the 9th of 15 inches.

In view of this and of the evidence of the independent witnesses as to its prevalence during the period in question, it must be taken to be likely to form; and the rise shewn on the 14th of January would render its formation probable on Cotton's evidence.

The efforts on the four days previous to the Saturday when Cotton went away, were directed to getting rid of the surface ice through the sluiceway, which in that way, and at the then temperature, according to the evidence, would naturally attract and keep ice in it and upon the apron. Patterson says that ice on the apron is formed partly by leaking through the sluice. This added to that produced by the spray and anchor ice evidently resulted in a blockade in the sluiceway. Cotton says the apron during the whole time he was there was in the condition shewn in exhibit 7, and Dobie, defendant's mechanical superintendent, admits that the ice might have been like exhibit 5, when they began to chop, though he did not see it. I think the proper conclusion from all the evidence and circumstances is that when the deceased and Bert Lockington, at 10.30 on the morning of 14th January, 1912, came upon the scene, there was a stoppage caused by the formation of ice, probably largely by anchor ice, which according to Delisle and Johnston forms early in the morning. The latter also says that ice would form up like the model in 24 hours. I think

that prompt measures were necessary, and that the act of the deceased was a proper and legitimate one within the scope of his employment, and in the line of his duty. There is no way of getting rid of anchor ice except through the sluiceway, the clogging of the rack being the thing to be avoided, as it both stopped the flow of water and endangered the rack itself.

The case of *Higgins* v. *Hamilton Electric Rw. Co.*, 7 O. W. R. 505, expresses in a few words a view in regard to the workmen there similar to that to which I have come on this branch of the case, as applicable to the deceased, namely, "that upon the general order which the workmen had received from the superintendent they were not forbidden to go behind these slats, and that for the purpose (specified) they were authorized and required and it is reasonable, necessary and proper that they should go there."

The next question is whether the defendants were negligent, in their system or plant, and whether the plaintiff's injury and death were caused by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings and premises connected with, intended for, and used in the business of the defendant company.

I think there were defects, and that the defendants were negligent in that respect, both at common law and under the sub-section of the Workmen's Compensation Act referred to above. The element which was being dealt with was a dangerous one; water power. The wing-dam, which is very long, is wholly unprotected both on its outer and inner sides, as are the walls of the forebay and flume except between them and along one side of the latter. There is a depth of twenty feet of water in the forebay. The surface or the wing-dam was, and continued to be, covered with ice, or ice and snow. Work under Cotton and his predecessors was treated as dangerous, and the visits of Patterson and Dobie supplied them with ample knowledge in this respect; and the use of ropes, which were kept in the store room of the power house for use in the machinery, and for the men clearing ice, was resorted to.

Their use was neither compulsory nor invariable, nor was the method employed the same on all occasions; the end sometimes being attached to a post and sometimes held by another man. Even Cotton does not say that his instructions as to ropes extended to work done on the sluiceway or on the

apron, but in all his answers mentions work inside the sluiceway and on the rack; and he thus defines their helpfulness: "If ropes properly put on, properly tied, and in the hands of competent men, no element of danger remains." They were at most temporary, occasional, makeshift safeguards, not specially designated for the work about and on the ice, and needing in their use a competent man to hold and a snubbing post to tie the end to. There were no life belts nor life lines (since supplied). The apron extended out 10 feet 3 inches (since shortened to 5 feet); and this length necessitated work on the ice which could not be reached from the pier. There was no guard rail nor railed platform extending even a few feet out from the wing-dam over the sluiceway apron to enable the ice at the end of the apron to be broken with safety, although there is a rail above the rack.

I do not accept the evidence that the ice, if attacked, from inside the sluiceway, would disappear when the water was let through. That might be true as to so much as could be reached and broken up from a position inside the sluiceway. This was 23 feet 6 inches long, and 5 feet 10 inches across, but only 4 feet 6 inches in height; not enough, when clear, for a man to work upright in; and I cannot reach the conclusion that ice, if solid at the end of the apron, 10 feet 3 inches from the end of the sluiceway, would give way before the rush of the water unless loosened by chisel or axes outside. The fall is three feet; and the speed of the water was, to my mind, greatly magnified by witnesses, who dealt with the current as unobstructed.

In *Cairns* v. *Hunter*, 17 O. W. R. 947, the absence of a guard rope, in *Quimlo* v. *Bishop*, 20 O. W. R. 313, of a guard and proper boots, and in *Montreal Park, etc.* v. *McDougall* (1905), 36 S. C. R. 1, of rubber gloves, were held to be negligence in the employer.

The plaintiff suggested a railed platform extending out above the apron (ex. 6). The objection to it, namely, that it would attract the spray and cause the ice to form under it so as to reach down to that on the apron, may be a valid one if it was as long as shewn, but if the apron had been as short as it now is—about 5 feet—a very modest railed platform would have enabled the outer end of the ice on the apron to be safely reached. The evidence of Fish and Hicks and

others satisfies me that such a safe-guard would have entirely obviated any danger.

The common law liability of an employer was stated in 1868, by Lord Cairns, in *Wilson* v. *Merry,* L. R. 1 Sch. Ap. at p. 333, to depend on whether the employer had exercised due care in selecting proper and competent persons for the work, and furnished them with "suitable means and resources" to accomplish the work. Lord Colonsay uses the expression "to provide, or supply the means of providing, proper machinery or materials." In *Smith* v. *Baker,* [1891] A. C. 325, at p. 362, Lord Herschell, says the duty is "to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." See also *Schwab* v. *Michigan Central Rw. Co.* (1905), 9 O. L. R. 86; *Can. Woollen Mills* v. *Traplin,* 35 S. C. R. 424, and *Nylaki* v. *Dawson,* 6 O. W. R. 509, 7 O. W. R. 300, where the use of an ordinary open hook instead of a safety hook—where the danger was obvious and constant, and the means of averting it simple and apparent—was held negligence in the employer.

In *McKeand* v. *C. P. R.,* 16 O. W. R. 664, p. 667 (18 O. W. R. 309) it is said: "When we find a workman in the course of his employment placed in a position of peril by the negligence of his master in the construction of the works and ways of the master, and an accident happening precisely in the way one would expect as the result of the negligence found, a jury can infer that the negligence caused the accident." It was not argued that the letter was an order under under sec. 3, sub-sec. 3, and I have, therefore, not considered the question which might be raised under that sub-section.

But notwithstanding these two findings, the defendants contend that the plaintiffs accepted the risk. In determining this question it is necessary to consider the cases on the subject.

Originally it was held that notwithstanding the common law liability imposed on the master to carry on his business on such a system and with such appliances as not to expose his workmen to unreasonable risk, a workman could by voluntarily agreeing to take the risks arising from their non-fulfilment absolve the master from the consequences of his breach of duty, whether or not the danger was one which

might be called incidental to the work or was occasioned by the imperfect conditions under which the employer carried it on. That agreement need not be made in express terms, but could be implied from the conduct of the workman.

It was laid down in *Thomas* v. *Quartermaine,* 18 Q. B. D. 685, by Bowen, L.J., at p. 697—speaking of the maxim *volenti non fit injuria,* that knowledge may not be a conclusive defence, but when it is knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered—that is, with knowledge and appreciation of both risk and danger—the defence is complete. The learned Judge was then referring to the maxim and not to contributory negligence, which, as he observes, arises when there has been a breach of duty on the part of the defendant, not where, *ex hypothesi,* there has been none. The case was decided upon the ground that the workman had voluntarily incurred the danger "incident to a perfectly lawful use of his (the owner's) own premises."

It would appear to me, from the judgments in the above case and those in *Smith* v. *Baker* (*infra*), that there may be three positions as to which the maxim may apply; (1) where there is danger inherent in the work itself and where precautious are actually or commercially impossible, or where none are in fact taken, and where the workman consents, in the sense of agreeing voluntarily, to engage in the work with the knowledge and under those conditions (per Lord Watson in *Smith* v. *Baker,* p. 356, Lord Herschell, S. C. p. 360-362, Lord Bramwell, S. C., p. 344, per Bowen, L.J., p. 695, and Fry, L.J., p. 701-2, in *Thomas* v. *Quartermaine,* per Romer, L.J., in *Williams* v. *Birmingham,* [1899] 2 Q B. 338)—(2) where the work is intrinsically dangerous notwithstanding that reasonable care has been taken to render it as little dangerous as possible, and the workman undertakes to do it, he thereby voluntarily subjects himself to the risks inevitably acompanying it (per Lord Herschell in *Smith* v. *Baker,* p. 360) or, as put by Bowen, L.J., in *Williams* v. *Birmingham Battery Co.,* [1899] 2 Q. B. 338, where the danger is visible and the risk is appreciated and the injured person, knowing and appreciating both risk and danger, voluntarily encounters them; (3) where the inevitable consequences of the employee discharging his duty would obviously be to occasion him personal injury and where it is clearly brought home to his mind that the risk he ran was from a

danger both foreseen and appreciated. Per Esher, M.R., in *Yarmouth* v. *France* (1897), 19 Q. B. D., at p. 651. Lord Watson in *Smith* v. *Baker,* p. 357, per Lord Herschell, S.C., p. 361-2-3.

But, as pointed out in *Smith* v. *Baker,* the acceptance of the risk of negligence in the conditions of the works, ways, etc., or in the conduct of the master's operations is not covered by the maxim except in cases included in No. 3. The doctrine was considered in *Yarmouth* v. *France,* 19 Q. B. D. 647, and it was there laid down that the question of whether a workman could be said to be "*volens*" was a question of fact depending upon the evidence adduced in each case, and that the Court had no right to draw this inference merely from the fact of knowledge of the risk, together with continuance in the employment. The majority of the Court considered the workman's complaints and the reply of the foreman some evidence of non-acceptance of the risk, and held the defendants liable for the result of a defect in the plant, under the Workmen's Compensation Act.

In *Church* v. *Appelby,* 60 L. T. N. S. 542, it was held that in the case of a workman who was killed, the defence applied and that although no evidence could, therefore, be given as to the state of his mind with reference to the risk, knowledge of the defect coupled with the continuance in the employment, was some, if not conclusive, evidence of willingness to incur it. Under our Act such continuance is expressly made non-conclusive.

In *Smith* v. *Baker,* [1891] A. C. 325, the Lord Chancellor put the question of law there involved as being whether upon the facts and on an occasion when the very form of his employment prevented the plaintiff from looking out for himself he consented to undergo this particular risk, and so disentitled himself to recover and concludes that the maxim is not applicable because the compulsion of that form of employment rendered him unable to take precautions. Lord Herschell at p. 367, explains that knowledge and appreciation must be of the risk which arose on the occasion in question from the particular work which the plaintiff had then to perform, and thus brings up the limitation on contributory negligence mentioned by Lord Esher, L.R., in *Thomas* v. *Quartermaine,* in his dissenting judgment at p. 690—"if the servant, in spite of the danger, does any act tending to save life or to the protection of his master's

property, I protest against its being said that the jury are bound to find that there is negligence in such case on the part of the man who runs the risk."

As stated in *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338, the defendant must obtain a finding that the plaintiff had agreed to undertake the risk of the defect or negligence upon which the action was founded, and that a finding that he knew of the risk is not sufficient.

In that case Sir A. L. Smith, L.J., said: "This is a case of no proper appliances having been supplied by the master at all so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk." The jury found that the plaintiff had the same means of knowing of the danger as the defendants, and that he did know of it. This is not the same as a finding that the plaintiff had taken upon himself the risk. That, as pointed out by Romer, L.J., is a question of fact in each case, to be decided acording to the circumstances; and his continuance in the employment with knowledge of the risk and of the absence of precautions is important but not necessarily conclusive against him.

In *Canada Foundry* v. *Mitchell* (1904), 35 S. C. R. 452, the maxim was held not applicable to a case where the foreman of a gang used unsuitable appliances, and knew, and fully appreciated the risk, but was not found by the jury to have, by continuing their use, voluntarily incurred it.

Nesbitt, J., in a very interesting judgment, dissented upon the ground that a workman who was perfectly aware of the danger of using these appliances, and took the course to save himself trouble must be held to have voluntarily accepted the risk. But he depends on the fact that proper appliances were provided, and not used by him, and that the workmen's option was exercised; a point, which the finding of the jury negatived.

In *Montreal Park, Etc. Co.* v. *McDougall*, 36 S. C. R. 1, it was held that it was not a sufficient defence to shew that the defendant had knowledge of the risks of his employment but there must be such knowledge shewn as, under the circumstances, leaves no doubt that the risk was voluntarily incurred, and this must be found as a fact. That is the *ratio decidendi* in *Blanguist* v. *Hogan*, 1 O. W. R. 15, and *Gordanier* v. *Dick*, 2 O. W. R. 1051.

In *Brooks, Etc.* v. *Fakkema* (1911), 44 S. C. R. 412, it was held that remaining in a place of danger was not a voluntary assumption of the risk of a dangerous operation.

In *Cameron* v. *Douglas*, 3 O. W. R. 817, the decision at the trial is not in my view reconcilable with the *Canada Foundry Co.* v. *Mitchell* (1904), 35 S. C. R. 452. The case, however, was sent back for a new trial (see 5 O. W. R. 35, 6 O. W. R. 673.)

Mr. Justice Anglin in *Grand Trunk Pacific* v. *Brulott*, (1912), 21 O. W. R. 206, 46 S. C. R. 629, 13 Can. Ry. Cases 95, thus expresses his idea as to what a finding that a workman is *volens* involves; "In order to find him *volens* the jury must have been satisfied that, with full knowledge and appreciation of the risk he incurred (in working without the protection of flags) he freely and without any compulsion, either of an immediate order or arising from fear of dismissal or serious reproof, assumed that risk as his own."

This is in line, though more adequately expressed, with the statement of Hawkins, J., in *Thrussell* v. *Handyside*, 20 Q. B. D. at p. 364: "It cannot be said that where a man is lawfully engaged in his work that he wilfully incurs any risk which he may encounter in the course of such work. . . . It is different where there is no duty to be performed and a man takes his chance of the danger, for there he voluntarily encounters the risk."

I am satisfied that in the circumstances I have already discussed as to the situation created by the letter; the conditions during the week preceding and on the morning of the 14th January the deceased did not, within the meaning of the maxim as explained by these cases, voluntarily accept the risk. He falls within none of the three descriptions and his case is well covered by Mr. Justice Anglin's view just quoted.

The last question is whether, notwithstanding the defect in the condition of the ways, etc., and although the defendants cannot succeed upon their plea that the deceased voluntarily accepted the risk—as I hold they cannot—they have still shewn such contributory negligence in the deceased as to prevent the plaintiff—his widow and personal representative—from succeeding.

In cases of neglect of duty by the master, contributory negligence is a good defence and may be proved by shew-

ing any act of negligence on the part of the workman but for which the accident would not have happened, which negligence may well include recklessness even in a needful exposure to danger.

I confess that this aspect of the case has given me considerable anxiety and I am not wholly satisfied that I am right in the view that the defendants must fail here too. It was contended that as the spot from which the deceased slipped was within four or six feet of the end of the ice on the apron (a place described by Bert Lockington as a dangerous, and by Johnston as a specially dangerous, one) —though George Lockington observes that one is just as likely to slip near the pier as further away—the deceased should have had a rope round him to be held by Bert Lockington, that ropes were in the store house, that he as operator had charge of all the stores, including these, that he knew they had been used on Friday, and that Bert Lockington asked for one before they began work on the apron. It is also said that in cutting ice he disobeyed the direct orders of Cotton.

Speaking generally, the dates are suggestive. On the 2nd of January Bert Lockington came. The work by these two had apparently not been satisfactory; (see the letter ex. 12), and on the 8th Cotton went down, and with two or three of the Lockingtons, making in all four or five, worked for the week and left on Saturday night. It was not explained why they did not return on Sunday, although the ice on the apron had not been attacked or removed.

Dealing, however, with the above contentions *seriatim*. If the apron was 10 feet 3 inches long, the deceased was four or six feet from the end of the ice on it, according to Bert Lockington who was between him and the face of the wing-dam, with one foot on the latter. On cross-examination Lockington says he was half way out on the ice, which extended out beyond the apron. He puts it at 2 feet beyond. An examination of the models corroborates this. If there was 12 feet of ice the deceased was half way or more out on it.

Delisle points out that when it is very cold they have to get out further from the pier to cut the ice. George Lockington, employed to cut ice, has been out as far or further than the deceased on the ice on the apron. But it was the outer end that had to be cut or opened; and whether the

deceased was only a foot beyond Lockington, or more than that, he was where in his judgment he could reach and open the ice where it blocked the end; and granting that the work had to be done by chopping, it cannot be recklessness to go to the only place from which it can be reached.

The best answer to the charge of recklessness is Cotton's opinion of deceased and his actions. He says he "knew Fairweather well, great ability, competent and skilled, not fool enough to be out on the ice for fun. If he was out there, cutting ice, he must have thought it necessary."

As to the ropes, no doubt there were ropes in the store room but knowledge of this fact by the deceased and of the one used on the 12th of January depends wholly upon Cotton's uncorroborated evidence. Bert Lockington says that he never saw deceased use a rope, and that while his brother was out on the chute with a rope round him on the 12th January, the deceased had not seen it as he was not out that day. George Lockington was not asked, nor was his father as to deceased's presence; and I prefer Bert Lockington's evidence on that point to Cotton's who says that deceased was there, and saw it. Johnston says that rope was not used after deceased came back till his death. Delisle says that ropes were used when deceased was there, but not in his presence.

For the reasons given later, I am not prepared to place implicit confidence in Cotton's evidence on this point, or as to his orders to Fairweather. Upon the question of contributory negligence, the onus is on the defendants, and they cannot succeed unless it is proved clearly; and I think Cotton's evidence on almost all material points is in conflict with the evidence of the other witnesses, and with the circumstances as I find them.

Cotton's story that he took deceased to the storehouse 250 feet from the power house, and shewed him three ropes, and told him to use them for the men for clearing ice from rack and sluiceway, looks, I think, a little too much like filling in the necessary gap in view of the evidence I have quoted, and is not probable having regard to some of the facts deposed to by others. Cotton was called at the very end of the defence, after the plaintiff's local witnesses, and those working there the last week, including the Lockingtons, had been examined.

Bert Lockington says "I told Fairweather I needed a rope on the day of the accident. Did not tell him what for; To put round one of us. I expect he heard me. He went into power-house, and then came back, and said wheels going faster than when he went in; said nothing about rope; one rope was in use. I don't remember if he said so."

It will be observed that Fairweather is not stated to have gone to the store house, but to the power house; and Bert Lockington himself, says he did not know there were more ropes in the store house, and asserts that the rope used by him and his brother on the 12th, was in use on the governor on the power house, on the 14th January. William Lockington speaks of the ropes being there for general purposes, and used on winch and cutting ice.

When Cotton was giving his evidence he stated that he had told deceased not to cut ice, and I so noted it. But I thought at the time that his answer was not intended to be direct, but argumentative, and that what he had said was rather by way of remonstrance or advice. To avoid doing him any injustice, I obtained from the reporter, a copy of that part of the evidence, which strengthens my view, because in both cases his answer has a reason added to it. I was not impressed by his testimony particularly on this point; and he gave evidence inconsistent with it, as follows;

"Q. And your instructions were to Mr. Fairweather that that would be his duty, to look after the ice? A. Yes.

Q. And you had confidence in his ability to do it? A. Yes."

However, I do not see that Cotton had any authority to give instructions to the deceased. He was sent there to give the results of his experience and information; but he is not put in charge nor is he given any mission except that of help. He was merely a fellow workman on that occasion. There was no warning against going upon the ice on the apron, and the alleged instructions do not specifically relate to that ice, more than to any other.

On the whole, therefore, and with some hesitation, I think that the defendants have failed to shew contributory negligence in the deceased.

There will be judgment for the plaintiff for the sum of $2,500 with costs of action. The apportionment of this sum can be spoken to before the formal judgment is settled.

Twenty day's stay.

MASTER IN CHAMBERS. MARCH 5TH, 1913.

TROWBRIDGE v. HOME FURNITURE AND CARPET CO.

4 O. W. N. 910.

Costs—Security for—Temporary Residence within Jurisdiction—Intention—Evidence—Family outside Jurisdiction—No Assets in Jurisdiction—Acknowledgment of Claim.

MASTER-IN-CHAMBERS made an order for security for costs where plaintiff had only resided within the jurisdiction a short time, his family continuing to reside outside of the jurisdiction and where it was not denied that he had no assets within the jurisdiction, in spite of plaintiff's assertions that he intended to reside permanently within the jurisdiction.

Nesbitt v. *Galna*, 3 O. L. R. 429, followed.

Motion by the defendants for security for costs under C. R. 1198 (b).

H. S. White, for the defendant's motion.

J. F. Boland, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—The action, which began on 10th February, is to recover $50,000 damages for breach of an agreement between the parties to employ plaintiff as manager of the defendant company. The agreement is dated 4th July, 1912, and in it the plaintiff is described as of the city of Toronto. He was to have full control of the business, and receive a salary of $50 a week. The engagement was to continue so long as the business shewed a net profit, of at least 10 per cent., and the plaintiff was to be entitled to one half of any further profit. The motion is supported by an affidavit of the president of the defendant company, alleging that plaintiff came to this city from Ohio, where he had always previously resided—and that he was informed by plaintiff, that his family still live there, and that plaintiff has no assets in Ontario, exigible under an execution.

The plaintiff says in answer that he is now, and was for some time prior to the commencement of this action, a resident of Toronto, where he intended, and still intends to reside. He does not contradict the allegations as to his family being resident in Ohio, nor of his having no assets within the province.

Neither party has been cross-examined. But since the argument, a further affidavit has been filed by plaintiff's

solicitor, making as exhibits, two letters from the president of the defendant company, dated 18th and 25th January, which contain expressions that might, but do not necessarily imply that there was something due to plaintiff. All that is said is "The adjusting of any sum that you are entitled to, can be taken up at any time," in the first letter—and in the second "Just as soon as it is possible to get off balance sheet shewing state of affairs, we will arrange to settle with you." These expressions are not such as that in *Stock* v. *Dresden Sugar Co.*, 2 O. W. R. 896.

In answer to this, an affidavit of the president is filed, stating that since those letters were written, he has made an examination of the company's books and affairs, and is satisfied that the company has a counterclaim against plaintiff, which greatly exceeds any sum that may be owing to plaintiff for his services even if he is not disentitled by reason of his misconduct.

Under these circumstances this case does not differ from *Nesbitt* v. *Galna*, 3 O. L. R. 429—and the order for security must issue within four days unless it is thought worth while to cross-examine the president on his second affidavit, in which case the motion can be spoken to again.

The costs of the motion will, as usual, be in the cause.

HON. MR. JUSTICE LATCHFORD. MARCH 5TH, 1913.

McNALLY v. ANDERSON.

4 O. W. N. 901.

Dower—Bar of in Mortgage—Extent of—Subsequent Conveyance of Equity to Trustee for Creditors—Dower not Defeated—Reference.

LATCHFORD, J., *held*, that a wife's right to dower in the lands of her husband was not defeated by a bar of dower in a mortgage executed by her, which said mortgage was subsequently paid off, or a conveyance by the husband alone of the equity of redemption to a trustee for creditors.

Re Auger, 26 O. L. R. 402, referred to.

Action by plaintiff, the widow of Jas. McNally deceased, for a declaration that she was entitled to dower in certain lands in the town of Aylmer.

W. R. Meredith, for the plaintiff.

W. H. Barnum, for the defendant.

HON. MR. JUSTICE LATCHFORD:—The lands were purchased by the deceased in 1895, and about the same time mortgaged for $350. The plaintiff joined in the mortgage to bar her dower. In 1899, the husband of the plaintiff, assigned to one Pierce, for the benefit of his creditors, conveying to the assignee his right of redemption. Such title as Pierce obtained under the assignment was transferred by various *mesne* conveyances—all duly registered—to the defendant, who asserts that he acquired an absolute title to the lands freed from the plaintiff's right to dower.

The mortgage, in which the plaintiff had joined to bar her dower, was given when her husband was seized in fee of the lands. It was paid off, and a discharge thereof executed before the assignment was made; but the discharge was not registered until after the assignee had conveyed to one of the defendant's predecessors in title. The plaintiff's husband died intestate after the conveyance to the defendant had been made and registered.

The lands at the date of the assignment were apparently subject to the mortgage. The discharge as stated had not been registered. If the mortgage was paid off before maturity, and therefore void, the fact was not established in the admissions on which the trial proceeded. In the view I take, the point is not material. The plaintiff is on other grounds entitled to succeed. As soon as her husband acquired the lands in fee her right to dower arose. Her bar of dower in the mortgage did not operate to any greater extent than was necessary to give effect to the rights of the mortgagee. R. S. O. (1897) ch. 164, sec. 7, sub-sec. 1; now 9 Edw. VII. ch. 39, sec. 10, sub-sec. 1. See *Re Auger*, 26 O. L. R. 402. When the mortgage was paid off her suretyship was at an end. It is quite true that the husband died seized of no estate, legal or equitable, in the lands. But he was the owner of an estate in fee during coverture. The plaintiff's right of dower then arose. It was not barred except for the purpose of the mortgage, and when the mortgage was paid off, her right was as complete, as if the mortgage had not been given.

She is entitled to dower as claimed, and to the costs of this action.

There will be a reference to the Master at St. Thomas, if the parties cannot agree upon the amount payable.

Costs of reference to plaintiff.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 4TH, 1913.

HUBBARD v. GAGE.

4 O. W. N. 901.

Principal and Agent—Real Estate Broker—Action for Commission Efforts of Plaintiff not Causa Causans of Sale—Amendment.

FALCONBRIDGE, C.J.K.B., dismissed plaintiff's action for a commission upon the sale of certain lands holding that the sale had not been consummated by reason of his efforts.

Sibbitt v. *Carson*, 26 O. L. R. 585, and *Sutherland* v. *Rhinhart*, 19 W. L. R. 819, affd. 20 W. L. R. 584, referred to.

Action by a real estate agent for a commission upon the sale of certain lands, tried at Hamilton.

S. F. Washington, K.C., for the plaintiff.

W. T. Evans, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—There is very little, if any, dispute about the facts.

Plaintiff is not a mere agent. He had an option from defendant in his own name, accompanied, it is true, by a letter, whereby he was to get a commission, if option accepted.

That option expired. The property was subsequently sold under another option given to H. S. Lees by the owners of the property—not by the defendant, who only had an option from them, but who made a profit out of the transaction.

Plaintiff had had negotiations with Lees during the life of his own option, but Lees and defendant had been unable to agree upon terms.

It is not the ordinary case of principle, and agent when the mere finding of a purchaser is ordinarily sufficient to entitle the agent to commission. It is more like *Sibbitt* v. *Carson* (1912), 26 O. L. R. 585; and *Sutherland* v. *Rhinhart* (1912), 19 W. L. R. 819, affirmed 20 W. L. R. 584.

The plaintiff fails and his action must be dismissed with costs.

I refer to the Appellate Division his application for leave to amend.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. MARCH 4TH, 1913.

RE PHILLIPS ESTATE.

4 O. W. N. 898.

Will—Construction — Gift to Nine Legatees — Certain of Legatees Related, Others Unrelated to Testatrix—"Aforesaid Heirs"—Meaning of—"Heirs" Construed Strictly.

A testatrix by one clause in her will gave $50 apiece to nine persons, six of whom were her nephews and nieces and were so described, the other three were unrelated to the testatrix. Immediately thereafter there is a gift of certain residuary estate to be divided amongst "the aforesaid heirs."

MIDDLETON, J., *held*, the residuary gift was confined to the nephews and nieces and the legatees unrelated to the testator did not share therein.

Costs to all parties out of estate.

Motion for construction of the will of the late Lydia Phillips, who died on the 1st April, 1912.

Spence, for the executors.

Kilmer, K.C., for nephews and nieces who are legatees.

Lewis, for other legatees.

The question arises with respect to the following clause "I also give, and bequeath to the following persons"—then follows a list of nine persons, to each of whom is given the sum of $50; six of these are described as nephews or nieces; the other three are named without description, and were not related to the testatrix. Immediately after this list of names is the following clause: "All moneys in bank, mortgages, and notes, held by me, after all expenses are paid to be equally divided among the aforesaid heirs." There remains an amount of $3,900, to which this clause applies. In addition, there is the proceeds of a parcel of realty, as to which the testatrix died intestate.

The question is, is this sum divisible among the six nephews and nieces, or among nine legatees

The nephews and nieces contend that the expression "the aforesaid heirs" must be constructed narrowly, and that they are alone entitled. The other legatees contend that the word "heirs" is used in a colloquial sense, and is equivalent to "legatees," and that the fund is divisible among the nine.

I have been unable to find any English case in point; but there are several American cases which deal with the precise question.

In *Clarke* v. *Scott*, 67 Penn. 46, it is said of the word "heirs" it "popularly often includes devisees, the persons who are made heirs—'*haeredes facti*'"—But the outstanding principle to be gathered from all the cases that is not the natural signification of the word, and this meaning is not to be attributed to it unless the will itself renders it imperative.

In Porter's Appeal, 45 Penn. 201, the facts are singularly like the facts here. The testator had there given legacies to six nephews and nieces, and also to some strangers; and then directed his residuary estate "to be equally divided among the whole of the heirs already named in this my will, proportioned agreeably to the several amounts given to each in the body of this my will.

After pointing out that popularly a legatee, or devisee may be spoken of as an "heir," but is, strictly speaking, an heir, or one on whom the law would case the estate if there were no will, the Court proceed to enquire, in which sense is the word in the residuary clause to be taken, and say, "We have had considerable difficulty with this question, on account of the comprehensiveness of the words 'the whole of the heirs already named;' but we cannot persuade ourselves that the testator intended to make his coachman, to whom he gave a $300 legacy, his heir also, and to admit him to the distribution of the residue along with the right heirs. Yet this absurd consequence would follow from construing the words to embrace all the previously named legatees. We think the better opinion is that the expression refers to the six nephews and nieces who would have been legal heirs, and who are named: in other words that the word 'heirs' is to have its technical and proper instead of its popular signification. There is nothing in the text of the will to forbid this construction, and therefore we feel bound to adopt it."

This case does not stand alone. *Townsend* v. *Townsend*, 25 Ohio 477, is very similar. There the testatrix made certain provisions, for her husband, for her collateral blood relatives, for blood relatives of a former husband, and for persons not related by blood or marriage also for certain religious and benevolent institutions; and then provided "the balance of my estate shall be equally divided among the heirs herein named."

The Court held that those entitled to take were confined to the named persons, who came within the descriptive word "heirs" and that the technical meaning of that word must not be departed from unless to carry out the manifest intention of the testatrix; and that upon the whole will the Court was not "constrained to substitute 'legatees' for 'heirs.'"

In *Graham* v. *De Yampert*, 106 Ala. 279, a similar residuary clause was construed as directing a division among the legatees, when it appeared that no heirs in the strict sense of that word were included among the named persons; and in *Re Hull*, 96 New York State Reporter, the surrounding circumstances compelled the Court to think that the testator had used the word in some sense, other than its strict meaning, and held that in that will, it meant all the named beneficiaries.

In the will in hand, there is nothing to prevent me from giving to the word its strict meaning; in fact, there is much to prevent any other meaning being attributed to it. The testatrix has indicated her heirs by following the name of each, with the words "my nephew" or "my niece." The amount of the legacies given in the first instance, fifty dollars each, is comparatively small; and it is unlikely that she would have intended the comparatively large benefit, to be conferred upon strangers. Another factor is this; that unless she intended to differentiate between her heirs, and the strangers, it would have been much simpler to have directed a division among the nine, than to have adopted the more elaborate provision found in the will.

The order will therefore declare that the fund in question, be divided amongst the nephews and nieces; the costs of all parties to be paid out of the estate.

As the testatrix died intestate with respect to a parcel of land, the proceeds of this land will bear the costs.

MASTER IN CHAMBERS. MARCH 4TH, 1913.

BROWNE v. TIMMINS.

4 O. W. N. 897.

Pleading—Statement of Claim—Motion to Set Aside—Irregularity Hudson v. *Fernyhough*, 61 L. T. 722, distinguished.

MASTER-IN-CHAMBERS validated a statement of claim filed long after the time therefor had expired but ordered the action to go down to trial at once and made the costs of the motion to defendants in any event.

Hudson v. *Fernyhough*, 61 L. T. 722, distinguished.

Motion to set aside a statement of claim as having been filed too late, and without leave.

J. Grayson Smith, for the defendant.

R. McKay, K.C., for the plaintiff.

CARTWRIGHT, K.C., MASTER:—This action was brought on the 8th January, 1908, to recover from the defendant $150,000 and interest from the 8th February, 1907; and also $23,619.06 and interest from the 28th February, 1907; and for other relief in respect of $350,000 of the La Rose Mining Company. The action was tried and judgment given on the 29th April, 1910, dismissing the action with costs, without prejudice to any action the United Cobalt Exploration Company might be advised to bring—it appearing that it was entitled to the money in question. On the plaintiff's appeal to the Divisional Court on the 22nd September, 1910, the trial judgment was set aside, and United Cobalt Exploration Company was added as a party plaintiff, with liberty to all parties to amend as advised—with costs in the cause. From this judgment the defendant appealed to the Court of Appeal, and on the 16th January, 1911, the appeal was dismissed. Nothing further was done until the 10th February, 1913, when a statement of claim was delivered. This the defendant now moves to set aside as being filed without leave, and therefore irregular, under Consolidated Rule 305, the time not having been extended under Consolidated Rule 353.

In explanation of the delay, an affidavit has been filed by Mr. McKay that it was owing to the inability of the plaintiff to get a witness, who is at present in California, but with whom the solicitors are now in communication, and whom they will be able to have at the trial.

Against the motion was urged the long silence and delay and also the principle of *Hudson* v. *Fornyhough*, 61 L. T. 722, affirmed in the Court of Appeal, 88 L. T. J. 253, and other cases cited in Yearly Practice, 1913 (Red Book), at pp. 346, 347.

The present case, however, is, I think, distinguishable, because, by the order of the Divisional Court, the United Cobalt Exploration Company was added as a party plaintiff with its consent, and the necessary license to do business in the province having also been produced.

The more regular course, no doubt, was to have amended the writ and statement of claim as soon as the time for any further appeal from the judgment of the 16th January, 1911, had expired. That judgment, however, confirmed the order of the 22nd September, 1910, which had made the exploration company a party plaintiff, and the omission to act promptly on the part of the plaintiff's solicitors (as now explained) is not a ground for setting aside the statement of claim and for nullifying the decisions of the Divisional Court and of the Court of Appeal.

It would have been better if the plaintiff's solicitors had moved for an order under Consolidated Rule 353, and had also previously informed the other side of the reason of this delay of somewhere about two years. Therefore, while the statement of claim may be properly validated as of this date, it would seem fair that the question of interest on any sums the plaintiff may ultimately recover be left open to the trial Judge or other tribunal to be dealt with, as in the similar case of *Finkle* v. *Lutz*, 14 P. R. 446, if it appears right so to direct.

The costs of the motion will be to the defendant in any event; and the trial should certainly not be any longer delayed, as the interest on the sums claimed is nearly $9,000 a year.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 27TH, 1913.

CHAPMAN v. McWHINNEY.

4 O. W. N. 699.

Principal and Agent—Real Estate Broker—Action for Commission —Purchaser Agreed to Pay—Evidence.

LENNOX, J., 23 O. W. R. 834, in an action by a real estate broker against the purchaser of certain lands, for a commission agreed upon, found as a fact that defendant had expressly agreed to pay such commission upon being informed by the vendor that he would not pay the agent any sum by way of commission. Judgment for plaintiff for $6,675 and costs.

SUP. CT. ONT. (1ST. APP. DIV.) affirmed above finding but reduced amount of judgment to $5,675. No costs of appeal.

An appeal by the defendant from a judgment of HON. MR. JUSTICE LENNOX, 23 O. W. R. 834.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

Gordon Waldron, for the defendant.

A. F. Lobb, K.C., for the plaintiff.

THEIR LORDSHIPS (V. V.), affirmed the finding of fact in the Court below, but reduced the amount of the judgment to be recovered by the plaintiff for his commission from $6,675, to $5,675. No costs of appeal allowed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 7TH, 1913.

BURROWS v. CAMPBELL.

4 O. W. N. 747.

Assessment and Taxes—Tax Sale—Action to Set Aside—Gross Irregularities—Plaintiff Continuing in Possession as Tenant of Purchaser—Estoppel—Sec. 173 Assessment Act—Stay of Execution.

Action to set aside a tax sale and tax deed. There had been gross irregularities in connection with the same, but plaintiff had had ample notice, and since the sale had continued in occupation of the lands sold, paying rent to defendant and his predecessor in title, who had purchased the lands at the said sale.

FALCONBRIDGE, C.J.K.B., (23 O. W. R. 271) *held*, that notwithstanding the irregularities, plaintiff could not dispute his landlord's title, and that the action was an unconscionable one.

Action dismissed with costs, thirty days' stay.

Quære, as to whether *Donovan* v. *Hogan*, 15 A. R. 342, is still a binding authority, having regard to the wording of present sec. 173 of the Assessment Act, 4 Edw. VII. ch. 23.

SUP. CT. ONT. (2ND. APP. DIV.) affirmed above judgment.

An appeal by the plaintiff from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 23 O. W. R. 271.

The appeal to the Supreme Court of Ontario, Second Appellate Division, was heard by HON. SIR WM. MULOCK,

C.J.Ex.D., Hon. Mr. Justice Riddell, Hon. Mr. Justice Sutherland and Hon. Mr. Justice Leitch.

L. C. Raymond, K.C., for the plaintiff.

F. W. Casey, for the defendant.

Their Lordships (V. V.), agreed with the judgment below and dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

Second Appellate Division. February 7th, 1913.

LEVITT v. WEBSTER.

4 O. W. N. 746.

Vendor and Purchaser—Specific Performance—Authority of Agent—Variation from Authorised Terms—Sale for all Cash Instead of Part on Mortgage—Dismissal of Action.

Action for specific performance of an alleged agreement to sell certain property in Hamilton. One Whipple, a real estate agent in Hamilton, had corresponded with defendant, who resided in Toronto, in reference to the sale of the property in question, and had received from her a letter stating she would sell for $5,000—one-half cash and balance on mortgage at 6 per cent., payable half-yearly. Later he submitted an offer of $4,500, to which defendants replied that she would not accept less than $5,000, and pointing out the revenue she derived from the property in question, finally for $5,000 all cash. Defendant repudiated Whipple's right to close the sale without further consulting her.

Kelly, J., (23 O. W. R. 633) dismissed action with costs on the ground that plaintiff's offer inasmuch as it was all cash, instead of one-half on mortgage, was not in accordance with the authorized terms of sale given by defendant to Whipple, and that the latter had no authority to conclude a sale on any other basis especially as defendant had intimated that the securing of a revenue was of great importance to her.

Sup. Ct. Ont. (2nd App. Div.) affirmed above judgment.

Bromet v. *Neville* (1908), 53 Sol. J. 321, not followed.

An appeal by the plaintiff from a judgment of Hon. Mr. Justice Kelly, 23 O. W. R. 633.

The appeal to the Supreme Court of Ontario, Second Appellate Division, was heard by Hon. Sir Wm. Mulock, C.J.Ex.D., Hon. Mr. Justice Riddell, Hon. Mr. Justice Sutherland and Hon. Mr. Justice Leitch.

A. M. Lewis and F. F. Treleaven, for the plaintiff.

H. E. Rose, K.C., and T. Hobson, K.C., for the defendant.

HON. SIR WM. MULOCK, C.J.Ex.D. (V. V.):—The members of this Court are unanimously of opinion that the judgment appealed from is right, and the appeal should be dismissed with costs.

HON. MR. JUSTICE RIDDELL:—In my opinion the *dictum* of Eve, J., in *Bromet* v. *Neville* (1908), 53 Sol. J. 321, (cited on behalf of the appellant and referred to in Fry on Specific Performance, 5th ed., para. 525, p. 269), to this effect (as stated in the head-note), that "it is not every excess of authority by an agent that will vitiate a contract, and where such excess is not unreasonable, it will not operate to prevent specific performance of the contract," is not a binding authority, as it was *obiter* and not necessary to the decision arrived at.

Appeal dismissed with costs.